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ABSTRACT

This paper addresses the issue of how the Americans with Disabilities Act (ADA) applies to commercial and other private sector Web sites. Beginning with a brief discussion of the role electronic communication plays in our lives, the paper then considers the placement of the ADA in the context of current technology and of computer usage in the country. The paper next analyzes the legal background to the ADA and Internet access issues, pointing out authorities and scholarship on both sides of the question. The paper goes on to identify the narrow legal issues, bearing most upon the definition of the word "place" in Title III of the ADA. It analyzes the meaning and application of this term, in light of the ADA's legislative history, its plain meaning, and court decisions applying this term in nontechnology-based settings. The paper concludes that the law does clearly contemplate the coverage of the Internet by Title III of the ADA. Finally, the paper explains the practical and economic arguments that should guide those implementing the law, suggesting strategies by which the accessibility principle can be broadly implemented without disruption and with benefit to consumers and businesses alike. (Contains 87 references.) (DB)

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National Council on Disability

An Independent agency working with the President and Congress to increase the inclusion, independence, and empowerment of all Americans with Disabilities.

WHEN THE AMERICANS WITH DISABILITIES ACT GOES ONLINE: Application of the ADA to the Internet and the Worldwide Web

Position Paper

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EXECUTIVE SUMMARY

This paper analyzes and answers the critical question: Does the Americans with Disabilities Act (ADA) apply to commercial and other private sector Web sites, and if so, what does it require.

Much discussion of this question seems to be conducted without careful attention to the case law and other authorities that have already built-up around this question. Beginning with a brief discussion of the role electronic communication has come to play in our lives, the paper then goes on to the placement of the ADA in the context of current technology and of computer usage in our country. Though many people are familiar with the term "digital divide," the paper suggests that we ought instead to be focusing on the opportunities offered by the digital future.

We next analyze all the legal background to the ADA and Internet access issue, pointing out authorities and scholarship on both sides of the question, and identifying as carefully and precisely as possible what these authorities actually do and do not say.

Through this process, the narrow legal issues, bearing mostly upon the definition of the word "place" in Title III of the ADA, are brought into clear focus. The paper then goes on to analyze the meaning and application of this term, in light of the ADA's legislative history, its plain meaning, and court decisions applying this term in nontechnology-based settings.

Many authorities, including those that are opposed to the view that the ADA should apply to e-commerce, are cited and discussed. But based on all the authorities, the paper reaches the conclusion that the law does clearly contemplate the coverage of the Internet by Title III of the ADA. Finally, the paper explains the practical and economic arguments that should guide those

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who may be called upon to apply the law, suggesting strategies by which the accessibility principle can be broadly implemented without disruption and with benefit to consumers and business alike.

I. INTRODUCTION

The emergence over the past decade of electronic communication, Internet technology and the worldwide Web have dramatically altered the lives of many Americans, and have in one way or another changed life for us all. Great transformation and many adjustments have been required to accommodate the new technology, opportunities and problems that these technologies have brought about.

Nowhere is this more the case than in our law. American law has struggled to keep pace and to come to terms with the new technology. In the ongoing process of adapting our law to the Internet, we have had to do two things. First, we have needed to pass laws that deal specifically with issues created by the Internet. Examples of these are the Digital Millennium Copyright Act of 1998 (DMCA), [fn 1] and the Digital Signature Act of 2000. [fn 2] Such new laws deal with complicated issues in far-reaching and controversial ways, but all new Internet-specific laws pale in complexity before the other task faced by our law. That second task is how to apply our existing body of law to the electronic age.

No one would ever call American law simple. What with the interplay between federal and state law, between statutes and court decisions, and between arguably conflicting provisions, it is rare to find anything approaching unanimity even in the expert legal community on any difficult or novel point. For example, expert tax accountants routinely reach different bottom line numbers in preparing tax returns based on the same information. With the additional need to apply existing laws, ranging from criminal law to patent law to civil rights, in cyberspace, that complexity has sharply increased. [fn 3]

The process of applying current law to the Internet is still further complicated by the rapid change in communications technology. E-mail spam for example has become a major issue, as people grapple with the potential of existing privacy laws or with the potential of new criminal laws to control it. Yet, were it not for a technology that allows people to send endless millions of messages, at virtually no cost and in little more than a few seconds, to recipients around the world, the social and legal issues associated with spam would not exist. Likewise, if an effective technological defense emerges, spam, as a legal issue, may largely disappear.

II. BARRIERS TO DIGITAL EQUALITY

While information-age technology has changed life for everyone, it has created unimaginable opportunities, and in some cases cruel frustrations, for Americans with disabilities. Quite naturally, most people initially think of the upside, of the potential for distance learning, telework, e-commerce, telemedicine, media access, online voting and so much more that, through computers, are available to everyone, including of course people with disabilities. But for many Americans with disabilities, as well as for many facing a variety of other barriers, access to this technology is more than just a matter of calling Dell on the phone or driving down to Radio Shack. Many barriers

exist to equal access, sometimes to any access, to these electronic resources for people with various disabilities in various settings.

Some of the barriers to electronic and information technology access and participation faced by people with disabilities can be traced to a multitude of challenges to their equal opportunity and independent living. To the extent that people with disabilities tend to be poorer than others, they are likely to have less access to a wide variety of society's benefits, including to technology and to what is available through technology. Such lack of access is self-reinforcing and contributes to further disparity in opportunity. To the degree that people with disabilities have lower levels of education, lesser choices in accessible housing, fewer options in transportation, or face other structural barriers such as minority status, residence in rural or inner-city areas that lack advanced telecommunications access such as broadband, or to the extent they are older, their disproportionate exclusion from digital access is all too readily foreseeable. [fn 4]

But it is more than the circle of poverty and lack of opportunity that must be understood if we are to grasp the barriers faced by Americans with disabilities attempting to use the Internet. For even when economic resources, skill level, access to broadband in one's neighborhood, and all the other dividing variables are taken into account, the access of people with disabilities to the Internet is still limited by the way Web sites are designed and managed (in other words, by factors over which the individual with a disability can have no direct control). Some Web sites and pages are so badly designed, so unattractive, difficult to use or uninteresting that no one, with or without a disability, would be long detained by them. Some are so poorly designed that even an interested surfer cannot navigate them. But when we speak about the accessibility and usability of Web sites to people with disabilities, it is not these subjective variables to which we refer. Rather, it is the extent to which the sites incorporate certain objective features or design principles that allow their content to be accessed by persons who interface with the Web in different ways, typically with the use of assistive technology.

It would surprise no one to be told that people who speak and read only another language cannot readily access textual Web sites written only in English. It should likewise no longer come as a surprise to learn that, while people who are blind can access the Internet with synthetic speech or braille output, they cannot do so if the Web site offers only graphics with no textual accompaniment to describe or explain what the pictures represent. Similarly, few who are familiar with TV closed-captioning would be shocked to be told that people who are deaf cannot access the audio content of Web casts unless captioning is available. [fn 5]

Although discussion of Web access and disability often focuses on the barriers faced by people with sensory disabilities, particularly people who are blind, people with almost every type of disability encounter barriers to Web access and use. Many examples can be cited, involving people with speech, motor, cognitive, seizure and other disabilities. The key point in responding to their concerns (and to assuring Web site operators their largest possible audience) is that while considerable technology exists to facilitate interface with the worldwide Web for people with various disabilities, such user-based technology cannot by itself suffice to bring about full access. There are many key respects in which the ability of people with disabilities to access information and services, and participate in commerce, education or other activities online, is conditioned upon design decisions made by those who operate our Web sites.

The proper allocation of responsibility for access, and indeed the need to assure access, have long been controversial issues. In the physical realm, over many years, many of these issues have been settled. No one would any longer suggest that it is the responsibility of a person using a wheelchair to figure out a way to get up a flight of stairs into a restaurant, store, other public accommodation or a government office. We require that such facilities and resources be accessible to people using wheelchairs, meaning that it be readily possible for the person using the wheelchair to enter, leave and navigate appropriately within them. We do not expect people with physical disabilities to drag around their own portable ramps. We would not deem it seemly, safe or legal to require a person with a disability to submit to being carried bodily into the City Hall, let alone requiring that such an individual recruit his or her own carriers.

The day may come when advances in mobility technology yield light, universally operable, low-cost chairs or similar devices that everyone can use, that hover on air, can maneuver in any space, and otherwise stretch the envelope of human factors and of physics. If that day comes, technology may well result in a reassessment of our laws. But until that day comes, and until our distribution system makes such halcyon technology available to all who want or need it, the obligation for those who deal with the public to make their facilities available to the public will continue to be a central feature of our laws and values.

As time goes by, the same debates are unfolding, and the same awarenesses emerging in cyberspace. With time, we are certain to reach the same level of awareness and the same allocation of responsibility as we have largely achieved in the in-person, physical realm, but the path to this parallel level of awareness is a slow and tortuous one, and recognition of the analogy is complicated by many factors. Yet it is precisely at the intersection between our awareness of the physical and the virtual worlds that the meaning and destiny of the ADA are brought most sharply and inescapably into focus.

Much of the argument, both for and against applicability of the ADA to the Internet, appears to involve people talking past one another, as we shall see. Those who support the law's application in cyberspace cite the enormous and increasingly central role played by the Internet in education, employment, commerce and even social and family life. They essentially argue that in light of these changes to our society, denial of access to the Internet, whether deliberate or through ignorance or indifference, condemns Americans with disabilities to inferiority of opportunity and second-class citizenship. A statute with the broad ameliorative purposes of the ADA, if it is not to be rendered a mockery, must possess the capacity and flexibility to cover those functions, services and activities on the Web that are identical in purpose and outcome to those that are expressly covered when provided in person. [fn 6]

These arguments are very compelling, but from the standpoint of those who oppose a broad interpretation of the law's mandate, probably irrelevant. Opponents are surely aware of the implications of the Internet for opportunity and quality of life, and in some cases will be cognizant of access issues pertaining to people with disabilities or other digitally-disenfranchied groups. But often in their view, there are strong countervailing policy arguments against construing the law anymore broadly than its literal, pre-Internet language absolutely requires. [fn 7]

There is also a third group. Among those who believe that the Internet should come within the ADA Title III definition of "public accommodations," there are those who believe that congressional action amending the current law will be required to bring this result about, or in the case of those who oppose such an application of the law, that congressional action will be required to prevent it. A congressional oversight hearing held three years ago still affords an interesting and informative glimpse into a broad range of views on the subject of the ADA' applicability to the Internet. [fn 8]

III. KEY ADA PRINCIPLES

For any readers who may not be thoroughly familiar with the ADA or who may not have followed its interpretation by the courts, the National Council on Disability's series of ADA policy briefs, Righting the ADA, is highly recommended. [fn 9]

In view of the existence of these policy papers and many other excellent resources, ([fn 10] this paper will concentrate on only those provisions and implications of the ADA bearing upon its application to the Internet and to other forms of electronic communication and commerce in cyberspace. In doing this three questions must be asked and answered: Is there anything in the ADA, in its implementing regulations, or in its authoritative interpretation by the Supreme Court that would in any way bar its application in online settings? Second, if the ADA applies in cyberspace, what are the criteria for determining when or whether it has been violated? And third, if the ADA applies in the virtual economy and world, are there proactive measures that covered entities can or should take to assure the adequacy of their compliance efforts, or must required actions be determined on a situation-by-situation basis?

Our formulation of the first of the three questions in the previous paragraph may initially seem strange. More typically, this question would be posed as: Does the ADA apply to the Internet? To this question, the answer, as detailed below, is an unqualified yes. Only in certain key areas, most notably Title III "public accommodations," does there appear to exist any material dispute on this key threshold question. As to Title I (employment) and Title II (state and local government), the applicability of the law to the Internet is not seriously disputed.

The major civil rights provisions of the ADA are contained in three titles. Title I of the statute deals with employment, [fn 11] Title II with the services and programs of state and local government, ([fn 12] and Title III with the goods and services of public accommodations and commercial facilities. [fn 13]

(a) TITLE I

Because the ADA was enacted in 1990, recent to be sure but before the public Internet existed or became a feature of everyday life, Title I, like the other parts of the law, does not refer to it. But the anti-discrimination scheme embodied in Title I and the role it envisions for technology leaves no serious doubt that such ne *w* technologies as the Internet are properly and necessarily to be taken into consideration in determining when or whether discrimination has occurred.

Title I requires covered employers [fn 14] to treat job applicants and employees with disabilities equally in terms not merely of the opportunity to work but also with respect to all terms, benefits and conditions of employment. [fn 15] No one has ever suggested that the requirements of the law are in any way tempered or eliminated when performance of the "essential functions" of the job requires that the employee access a Web site or communicate with others by e-mail, through access to bulletin boards, or through the use of Internet or intra-net capabilities. No case or serious scholarly or legal argument has ever been found to support the proposition that because a job's functions involve electronic communication, employers are relieved of the obligation to consider reasonable accommodations or other measures aimed at facilitating equal access to the tools of the trade.

This is not to say that courts have required that Web sites be made accessible according to some legal standard of accessibility, or that particular disputes be resolved by the acquisition of hardware and software designed to facilitate access. Indeed, there are numerous cases holding that a particular computer access strategy sought by an employee is not required by law, either because its cost would impose an "undue hardship" on the employer, [fn 16] or because no technology that could facilitate competitive performance could be found, [fn 17] or because the employer had exercised its right to restructure the worker's job in such a manner as to remove the need for Internet access. [fn 18]

By and large, the courts have not been friendly toward ADA plaintiffs alleging job discrimination, [fn 19] and many of the cases upholding the employer's right to refuse a job or to refuse an accommodation are harsh, but nowhere in the litany of reasons advanced in these court decisions for why workers with disabilities should be rebuffed is there a suggestion that Internet-oriented or Web-based performance issues or work settings are per se off-limits to the law's reasonable accommodation and nondiscrimination requirements.

A number of key federal agencies with enforcement responsibility of Title I have also acknowledged the applicability to cyberspace of the law. For example, on December 26, 2002, the Federal Government, as part of the President George W. Bush's New Freedom Initiative (NFI) issued proposals for enhancing telework programs for persons with disabilities. [fn 20] More recently, on February 15, 2003, the Equal Employment Opportunity Commission (EEOC), in carrying out its responsibility for implementing Title I of the ADA, issued a major new guidance on telework. [fn 21] To the degree that much, if not most, telework today is carried out with the use of computers, it is hardly likely that either of these initiatives would have been forthcoming if anyone had any doubt that the requirements of nondiscrimination in employment apply online as much as they do in-person. To the contrary, recent initiatives such as these, aimed at both federal and private sector work settings, reflect a pervasive awareness that employment opportunities for people with disabilities (and avoidance of discrimination against workers with disabilities) centrally involved the Internet. Put another way, if Title I did not protect workers with disabilities from discrimination in the use of and access to the electronic resources necessary to do their jobs, there could be no legal issue of discrimination against them and there would be no occasion for issuance of the EEOC guidance. Unequal treatment or access to telework via computer would be of no significance, and the EEOC guidance would be irrelevant. At the very least, the EEOC would have made clear that its definition of telework excluded Web- or other computer-based jobs. Of course, it neither stated nor intended any such qualification.

Additionally in this connection it should be noted that, apart from the ADA, several categories of employees are already guaranteed equal access to the Internet by law. These include: federal government employees whose work requires access to electronic and information technology (E&IT)(by virtue of Section 508 of the Rehabilitation Act Amendments of 1998); [fn 22] employees of governmental and private entities that are "recipients" of "federal financial assistance" (through the operation of Section 504 of the Rehabilitation Act); [fn 23] and employees or contractors of state or local government covered by state information technology (IT) accessibility and civil rights laws in several jurisdictions. [fn 24]

(b) TITLE II and the Web

Title II of the ADA bans discrimination on account of disability by state and local governments. It is not generally believed to apply to employment, which is governed by Title I, [fn 25] but does apply broadly to all the other activities of these entities.

Title II is inclusive in its terms, referring and applying generally to all state and local governmental programs and activities. The statutory language is simple, brief and comprehensive: "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." [fn 26]

Among the means by which these requirements can be met, the statute lists: "reasonable modifications to rules, policies, or practices," "the removal of architectural, communication, or transportation barriers," or the provision of "auxiliary aids and services". [fn 27]

The test for who can expect to be protected by these requirements is also broad. Title II covers any "qualified individual with a disability" who "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." [fn 28]

While eligibility for many programs, ranging from vocational rehabilitation to paratransit services, is based on individualized determinations as to whether a person meets the legal test for having a disability, and if so, whether the individual is eligible under the criteria for the program in question, many other governmental programs are offered to all members of the public. It is primarily in connection with the programs, services and facilities that state and local government offer to the public that such requirements as those for the removal of barriers or for the reasonable modification of policies and procedures come into play.

An illustration drawn from the physical access realm may serve to put this point into context for electronic communication. Leaving aside the legalities, it would be absurd to renovate a public building without incorporating appropriate accessibility design features. Imagine a city defending such a decision on the ground that it would accommodate any individual's needs with ad hoc measures when presented. Economic and practical considerations would quickly demonstrate the folly of such a course.

Enter the Internet. For a variety of reasons, government at all levels has opted to make increasing use of electronic communications, ranging from information kiosks to online forms and agency Web sites, in its communication with the citizenry. On balance, policymakers appear almost unanimous in the belief that substitution of electronic and decentralized for in-person and facility-based citizen-government contact results in reduced public sector costs and increased citizen participation and compliance. It is not the purpose of this paper to evaluate these assumptions. Rather, we are concerned with their implications for citizens with disabilities and with the law's ability to encompass them.

If public Web sites of the sort that have increased with such rapidity over the past five years are not designed and implemented with accessibility and inclusivity in mind, they run the risk not of broadening but potentially of narrowing the participation of many people, especially if migration to on-line services is accompanied by cutbacks in facility-based, telephone-based, postal-based and other traditional service types. Ironically, since benefit to people with disabilities is a frequent, almost reflexive rhetorical justification for putting public services online, it can often be these very citizens with disabilities, arguably facing barriers in their access to traditional services, who encounter the greatest new accessibility barriers. Although administrative agency and court rulings on the subject are thus far few in number, such authorities as we have point strongly and consistently to the conclusion that Title II of the ADA applies to governmental Web sites, just as it applies to public buildings and physical facilities.

1. EFFECTIVE COMMUNICATION

In fulfillment of its oversight responsibilities for public education under both Title II of the ADA and Section 504 of the Rehabilitation Act, the U.S. Department of Education, through its Region IX Office of Civil Rights (OCR), undertook eight investigations during the period 1994 through 1999, both in response to complaints by students at California public colleges and universities, and proactively into the California Community College System. [fn 29] The complaints and settlements (all were resolved by settlement with the institution) in each of these cases centered around the question whether the schools had met the law's requirement of effective communication and equal access. For central to the law's notion of equal access is the substantive notion of effective communication by governmental entities and programs with citizens with disabilities. [fn 30] All involved access to campus, class and course-related materials and media, including campus computer labs, curricular materials, libraries, class schedules, and specifically in the San Jose State University case to the Internet. [fn 31]

Although these OCR decisions were all made in one of the U.S. Department of Education's regions (Region IX covers several western states), their impact has been national in scope. In addition to applying the "effective communication" and equal access provisions of the law to electronic communications, they fashion clear and replicable standards for evaluating whether the measures adopted by institutions are adequate. In determining the effectiveness of communication strategies and the adequacy of the "auxiliary aids and services" used to do the communicating, the OCR decisions set forth a three-prong test: accuracy, timeliness and appropriateness. As stated in the OCR's California State University-Long Beach findings letter:

"OCR has repeatedly held that the terms "communication" in this context means the transfer of information, including (but not limited to) the verbal presentation of a lecturer, the printed text of a book, and the resources of the Internet. In construing the conditions under which communication is "as effective as" that provided to people without disabilities, on several occasions OCR has held that the three basic components of effectiveness are timeliness of delivery, accuracy of the translation, and provision in a manner and medium appropriate to the significance of the message and the abilities of the individual with the disability." [fn 32]

This standard has been broadly applied and often quoted, including in settings outside of education and far beyond Title II. The accuracy and timeliness prongs should be fairly self-evident in their meaning. It doesn't do any good to give a student who is blind access to a textbook after the semester has ended. It serves no purpose to provide a sign-language interpreter to a person who is deaf for a medical consultation about the risks of surgery if the interpreter does not have the vocabulary skills or experience to render the physician's explanation or answers with any fidelity.

The third prong, what is generally called appropriateness, is a bit more complex and could provoke more disagreement as to when it has or has not been met. Take the case of a person who is deaf being informed of medical test results showing the existence of a serious or an embarrassing condition. Would it be appropriate or effective for this information to be rendered by a highly competent sign-language interpreter but for the interpreter to be dismissed by the physician before the patient has had the opportunity to pose any questions? Likewise, if a person who is blind is being informed of a long list of figures pertinent to a large bill, would it be sufficient for someone to recite these aloud, once, quickly, without slowing down, repeating or providing them in some accessible, more permanent form? Yes, in these cases the information has technically been provided, but not in an accessible or effective manner.

Application of the effective communications standard to the Internet raises a unique set of issues. Once we have thoroughly reviewed the question of the applicability of the ADA to electronic settings, we will return in section V to this issue, which brings us face to face with the question of what exactly does the ADA require in these settings, assuming it applies to them.

2. TRANSPORTATION

The area in which the accessibility of public sector Web sites has received most attention is perhaps that of public transportation. Virtually every metropolitan regional or municipal transportation authority or district now maintains a Web presence as a means of providing schedule, route, fare and other information to customers.

Public transit systems must comply with a variety of accessibility requirements. These include the more familiar ones relating to their accessibility to persons using wheelchairs, but they include information accessibility requirements as well, ranging from requirements for stop-calling by vehicle operators to provisions bearing upon the accessibility and usability of ticket and fare machines. [fn 33]

Perhaps because public transit is important, and perhaps because these other requirements have sensitized people to the access issues surrounding them, many have wondered whether the law

requires its Web sites to be accessible to all members of the riding public. In 1999 *Tamez v. San Francisco Metropolitan Transportation Commission*, [fn 34] a complaint filed under the ADA over the inaccessibility of such a Web site, became the most tangible product of such discussion and concerns. That complaint never eventuated in a judicial decision. However, in 2002 a public transit Web site became the occasion for the first known reported Federal Court opinion on the applicability of Title II of the ADA to the Internet.

In *Martin et al. v. MARTA* [fn 35] a number of individuals with disabilities filed suit against the Atlanta public transit agency under both the ADA and the Rehabilitation Act, alleging numerous violations in areas including accessibility of information. In finding MARTA in violation of the ADA due to the inaccessibility of its Web site (scheduling, route and other key information was inaccessible), the Federal District Court relied on Title II of the ADA. The court relied specifically on both parts of Title II: on the provisions of Part B of Title II dealing specifically with the obligations of transit systems, and on the provisions of Part A dealing generally with all activities of state and local government. Thus, the opinion should not be read as limited to Web sites maintained by transportation agencies but clearly applies to state and local agencies and entities of all kinds.

In granting plaintiffs' motion for a preliminary injunction, the court stated: "The entity shall make available to individuals with disabilities adequate information concerning transportation services. This obligation includes making adequate communications capacity available, through accessible formats and technology, to enable users to obtain information and schedule service. 49 CFR 37.167(6). MARTA makes schedule and route information freely available to the general public. This information is contained in maps and brochures available at MARTA stations. The information is also accessible to the general public on MARTA's Web site. The information is not equally accessible to disabled persons, particularly the visually impaired. Although particular route and schedule information is available by telephone, this is not the equivalent to what MARTA provides to the general public. MARTA can do a better job of making information available in accessible formats to the visually impaired. "This Court holds that the Plaintiffs have met their burden to show a likelihood of success on the merits for Defendants' failure to make available to individuals with disabilities adequate information concerning transportation services through accessible formats and technology to enable users to obtain information and schedule service. 49 CFR 37.167(6); 28 CFR 35.160. A disabled transit user cannot adequately use the bus system if schedule and route information is not available in a form he or she can use."

The court did not conclude that alternative means of providing information, such as over the telephone, could never be adequate, but it didn't have to address that question since the evidence showed that they were not equal or timely here, and because MARTA, which admitted that its Web site was inaccessible, indicated it was endeavoring to upgrade it so as to make it accessible. Likewise, because MARTA was actively engaged in such an effort, the court had no need to specify exactly what steps MARTA needed to take in order for its site to comply with the law. Only when MARTA claims that it has achieved accessibility will the precise standards and methods used be before the court:

"MARTA representatives also concede that the system's Web page is not formatted in such a way that it can be read by persons who are blind but who are capable of using text reader computer

software for the visually impaired.... However, it now appears that MARTA is attempting to correct this problem. Until these deficiencies are corrected, Marta is violating the ADA mandate of "making adequate communications capacity available, through accessible formats and technology, to enable users to obtain information and schedule service." [fn 36]

The question may be asked whether, if MARTA could provide the necessary information by alternative means, the law would exempt it from Web accessibility requirements. Put another way, this question may be posed as: Would the concept of "equivalent facilitation" come into play to allow the transit agency to avoid Web accessibility requirements? This is largely an academic question, however, since there is no practical way for this to be done. There is no feasible way, at any remotely acceptable cost, that the information provided in an instant, on-demand, 24-7, and the interactive capacity afforded by a transit agency's Web page, could be replicated or equaled via a telephone assistance system, let alone by the mailing out of hard-copy documents.

The key point to remember in this regard is that the ADA requires "equal" access, not just some minimal level of access that is deemed "adequate". Moreover, even if some minimal though not equal standard were all the law required, what conceivable adequacy could be attributed to a system that gave schedule or route information hours, days or weeks after it was needed and requested, that gave users with disabilities no opportunity to interact with the information as other riders can, that provided no opportunity for verification of information conveyed quickly over a phone line, etc. By deciding what information it will offer to the general public, a public transit agency or other governmental entity decides by definition what information it will give to those members of the general public who have disabilities.

As of this writing, the outcome of MARTA'S efforts to make its Web site accessible are yet unknown, but as we shall see in Section Five, currently available technology and widely accepted standards should result in success without much difficulty or delay.

What is important to note though is that whatever the resolution of this and the other issues in the MARTA case, application of the ADA to these or other Web sites in no way implies any new federal oversight over the contents of those Web sites. There are any number of informational elements that people with various disabilities might wish a transit operator to include on its Web site. Riders with visual disabilities might like to know whether the bus that runs down Main stops on the north or the south side of Fourth, and how many feet from the corner. People with mobility impairments might like to know whether particular bus stops are on hills. Any number of people, with and without disabilities, might like to know if particular light rail stops are in well-lighted and heavily-traveled or desolate lonely areas. All of these and many other concerns are entirely legitimate, and a transit agency with any commitment to customer service might do well to collect and make this information available. But neither the ADA nor any other federal law obliges these agencies to provide such data. All that the ADA requires, here as in the other contexts we will discuss throughout this paper, is that whatever information the agency does elect to provide is as available to people with disabilities as to everyone else.

IV. PUBLIC ACCOMMODATIONS

(a) THE PROBLEM

Title III of the ADA differs from Title II in several significant ways. Most relevant here are the differences in how it addresses the question of what activities, performed or carried out by what entities, are covered by the law. Whereas virtually all state and local government entities and activities are covered by Title II, there are important limits on the range of private entities and the types of their activities that are covered by the law under Title III.

Title III bars discrimination on the basis of disability by "places of public accommodations" and "commercial facilities" "engaged in commerce." [fn 37] As a result, in order to get Title III to apply in a particular situation, it is necessary not only to demonstrate that the entity in question is a public accommodation or commercial facility engaged in commerce, but also, because of this single word "place," that it is a "place of public accommodation" where, or in connection with which, the alleged discrimination has occurred.

As the statute states: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." [fn 38] "The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce –

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation." [fn 39]

"The term "commerce" means travel, trade, traffic, commerce, transportation, or communication -

(A) among the several States;

(B) between any foreign country or any territory or possession and any State; or

(C) between points in the same State but through another State or foreign country." [fn 40]

"The term "commercial facilities" means facilities -

(A) that are intended for nonresidential use; and

(B) whose operations will affect commerce..." [fn 41]

The Web sites people will use for shopping, for research, or for entertainment readily come within the scope of the kinds of entities that are deemed public accommodations. They provide goods and services to the public like stores, online versions of games and entertainments that people might otherwise witness or participate in in-person; information of the sort one in a less hectic, more personal way one might have obtained across the desk from one's doctor; and access to the resources of the world's greatest libraries or the library down the street. In many cases companies' or institutions' Web sites are connected with their earthbound locations and activities; in other cases they are not. No one seriously disputes that the Internet plays a large and increasing role in commerce and recreation, education or employment. No one disputes that most commercial Web sites are engaged in commerce, by reason of the communication role they play, and by reason of the fact that it is difficult or impossible to design a public Web site that is available only to users in a single state and that reaches its users solely through within-state telecommunications. But many people continue to doubt that a Web site can be a "place" of public accommodation or a commercial "facility" as required for coverage of the law.

(b) THE DEPARTMENT OF JUSTICE

In probing the meaning of any federal law, the views of the agency charged with primary responsibility for interpreting and enforcing that law are entitled to considerable weight and represent the natural starting place. As long ago as 1996, the DOJ made clear its view that when public entities covered under Title II or public accommodations covered by Title III of the ADA choose to communicate with the public, their information must be made available to all members of the public, irrespective of disability. According to the DOJ, this is as true for information

distributed through computers or over the Internet as it is for information disseminated through other methods. [fn 42]

As explained by the DOJ in its letter to Senator Harkin:

> Covered entities under the ADA are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media such as the Internet. Covered entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well. Mr. [name omitted by DOJ] suggests compatibility with the Lynx browser as a means of assuring accessibility of the Internet. Lynx is, however, only one of many available options. Other examples include providing the Web page information in text format, rather than exclusively in graphic format. Such text is accessible to screen reading devices used by people with visual impairments. Instead of providing full accessibility through the Internet directly, covered entities may also offer other alternate accessible formats, such as Braille, large print, and/or audio materials, to communicate the information contained in Web pages to people with visual impairments. The availability of such materials should be noted in a text (i.e., screen-readable) format on the Web page, along with instructions for obtaining the materials, so that people with disabilities using the Internet will know how to obtain the accessible formats.
>
> The Internet is an excellent source of information and, of course, people with disabilities should have access to it as effectively as people without disabilities.

As this extended quote shows, the DOJ did not focus on accessibility of the Web page but on availability of the information, goods and services it conveys. As the reference to the Lynx browser also indicates, the methods available for making Web sites accessible in 1996, when this letter was written, were extremely limited and would often have required major alterations by Web site designers and operators.

In the intervening years the DOJ has argued for coverage of the Internet under Title III of the ADA in several amicus briefs, [fn 43] and it has negotiated or approved several complaint settlements supporting access in cases involving non-physical location issues such as brokerage or credit card statement accessibility. [fn 44]

Thus, even if grounds exist for believing that the department would countenance other strategies than Web site accessibility, DOJ has been consistent in upholding the right of people with disabilities to access to information provided on the Internet and in asserting the belief that electronic communication is subject to Title III. Put more broadly, the DOJ has not taken the position that to be actionable discrimination must occur "at" or "in" a "place" of public accommodation, or that the right to information-access is tightly tied to where the information is provided.

As a practical matter, any covered entity faced with the choice among methods for making Web-based information accessible is likely to conclude that doing so via that Web site is the best, if not the sole, feasible way. Given the speed of electronic communication, the frequency with which many Web sites are updated and changed, the cost and delays of providing alternative formats, and the inexpensiveness and straightforwardness of making Web sites accessible, it is hard to imagine that any entity faced with a choice among methods would opt for any approach other than accessibility, or that if it did, that timeliness, accuracy and appropriateness could be achieved.

Nor is it likely that the Department of Justice could conclude as a factual or legal matter that off-line alternative methods provided anything remotely resembling "full and equal access" to the information and resources of a commercial Web site. With effective communication the ultimate requirement, there appears to exist almost no conceivable situation in which a strategy other than Web accessibility would make business or legal sense. The very reasons people use the Internet are the reasons why that other methods of information dissemination cannot be equivalent.

(c) INTERNET ACCESS AND TELEPHONE ACCESS COURT CASES

We can obtain only scant guidance from the reported ADA litigation on electronic access. Moreover, because computer technology has changed so rapidly, many of the key issues that courts must face are best described as moving targets. Nevertheless, a review of what has been alleged, settled and decided to date should be useful in ferreting out some recurrent analytical principles that the parties and the courts have used. With these, some predictions about, and some guidance for, the future may be forthcoming.

In 1995, a complaint was lodged with the city of San Jose, California by a blind city commissioner who was unable to access the minutes of City Council meetings contained on the municipality's Web site. This resulted in the promulgation of the San Jose Web Page Disability Access Design Standards in 1996. [fn 45] These standards were important for two reasons: first, because they constituted an acknowledgment of the legitimacy of claims by people with disabilities for access to the Web; and second, because they demonstrated that objective and workable criteria for vindicating these rights could be devised.

Apart from *Tamez* noted earlier, the next major development following San Jose was the filing of suit in 1999 by the National Federation of the Blind (NFB) against America on Line (AOL). [fn 46] In this first known Web-access civil rights lawsuit, NFB charged that AOL'S proprietary Web browser interfered with the ability of blind people using screen-reader software to access the AOL system. It also alleged a variety of specific ways in which features of the site and capabilities enjoyed by other users or subscribers were inaccessible to or unusable by blind persons. Issues included text concealed within graphics, commands that should have been executable from the keyboard but that on the AOL system required the use of the mouse, inability to identify the precise timing or location for entry of data required to carry-out various searches, and a host of related functional barriers. In addition to constituting a failure of effective communication, the suit alleged that the barriers violated users' access rights to shopping, recreation, entertainment and other categories of public accommodations.

Although the complaint broke legal ground, its resolution was inconclusive. On July 26, 2000 the complaint was voluntarily dismissed, and the parties entered into an agreement. [fn 47] While of course acknowledging no wrongdoing, AOL undertook a number of voluntary measures, including establishment of an accessibility policy [fn 48] and consulting on accessibility with the disability community. For its part, NFB reserved the right to refile its suit if it deemed fit. [fn 49]

Meanwhile, another Title III Internet case was making its way from San Antonio's federal district court to the U.S. Court of Appeals for the Fifth Circuit. *Hooks v. OKBridge, Inc.* [fn 50] raised the question of the applicability of Title III to the Web, but did so in a very different way. In *Hooks*, there was no issue of technical barriers to Web access. Rather, the claim was that the appellant had been barred from the defendant's online bridge tournaments and associated bulletin boards because of his disability. If Title III of the ADA did not apply to the bridge club's Web site, then this discrimination, if it occurred, would be legal, and the plaintiff must certainly lose.

The trial court granted summary judgment to the defendant bridge club, dismissing the complaint on two grounds. One was that OKBridge was a private membership organization exempt from this and other civil rights laws; the other was that the Web site was not a "place of public accommodation."

The appeals court affirmed the lower court judgment but declined to follow its reasoning. Instead, the court held that since the defendant had not been aware of Hooks' disabilities, it could not possibly have intended to discriminate against him. Given this ground of decision, the case added little to the law, but for other reasons it is important.

The Department of Justice filed an amicus brief in the Hooks appeal, powerfully setting out many of the reasons why the law should not be construed as narrowly as the lower court had done. [fn 51] DOJ pointed out for example that reading Title III to exclude the Internet, when the Internet never existed and Congress never thought of it one way or the other at the time it passed the ADA, would be analogous to holding that freedom of speech does not extend to movies since movies were not mentioned in the First Amendment, or that the Fourth Amendment could not apply to the privacy of telephone conversations because telephone wires do not come within the ordinary meaning of the words "persons, papers and effects" used in the Fourth Amendment. [fn 52] No one has ever, to our knowledge, made a convincing argument that Congress would have excluded the Internet from coverage if it had known or thought of it. The amicus brief reinforced this commonsense point by citing cases in which comparably strained readings of the Civil Rights Act of 1964 had been rejected by higher courts. For example, in one case the lower court had concluded that the omission of any reference to "trailer parks" from a long list of types of rental housing covered by the law meant that somehow Congress had intended to exclude them. [fn 53] In another case the trial court had reasoned that because the list of entertainment venues covered by the Civil Rights Act were all places where the public attended as spectators, the law had to be read to exclude places of participatory entertainment such as amusement parks from coverage. [fn 54] Both decisions were reversed on appeal. Again, it was the clear purpose of the law, coupled with the lack of any indication in the legislative history that Congress intended such eccentric results, that supported the appellate rulings in favor of coverage. We will return to this question of statutory interpretation in Section Five, below.

The DOJ's Hooks amicus brief did something else as well. It made the case for a key distinction: "The statute covers the services "of" a place of public accommodation, not "at" the place of public accommodation." In support of this point, the brief cites numerous examples of the absurd results that would flow from limiting the law's protection only to acts and forms of discrimination that occur "at" the place of public accommodation. As DOJ summarized it: "a company that offers services both on-site and through other means (such as a travel service that arranges reservations both over the phone and at a walk-in office) would be required to offer non-discriminatory services on-site, but be free to discriminate over the phone or the internet. Neither the language of the statute, nor the underlying purposes of the Act, require or permit such an absurd result."

Another extremely important case, both for its result and perhaps even more for its reasoning, was decided by the U.S. Court of Appeals for the Eleventh Circuit (headquartered in Atlanta) on June 18, 2002. *Rendon et al. v. Valleycrest Productions Ltd.* [fn 55] did not deal with Web access as such. Rather it concerned an alleged violation of the ADA in connection with access by telephone, but the approach it adopted seems likely to find application and favor in many of the Internet cases that are likely to come to the courts over the next few years.

In *Rendon*, people with hearing and mobility disabilities sued the producers of the TV quiz show "Who Wants to be a Millionaire," charging that the "fast finger" contestant selection process used for the show tended to screen-out applicants with disabilities in violation of the law. People began to compete for the right to appear on "Millionaire" by calling a telephone number and answering a series of questions rapidly through entering responses with the keypad. But since the producers had no TDD available, people with hearing-impairments could not hear or respond to the questions and prompts quickly enough. Nor could the services of a relay operator have solved the problem. Moreover, because speed was required, people with several different mobility disabilities were physically unable to enter the responses with the requisite speed, or to enter them with the pushbuttons effectively at all.

The case came to the appellate court on appeal from a ruling by the lower court dismissing the complaint. [fn 56] In dismissing the complaint the trial court had relied on a single contention made by the defendants. They had argued that because the alleged act of discrimination had not occurred "at" a place of public accommodation, it was not covered under Title III of the ADA. As the producers analyzed it, yes, the TV show took place in a "place," a studio where contestants and audience were admitted, but the alleged discrimination, occurring over the telephone, could not be said, in the view of the defendants and of the district court, to have occurred at any place of public accommodation. After all, the public was not admitted where or when the phone calls were answered.

It was with the case in this posture, and with this issue squarely before it, that the Court of Appeals considered *Rendon*. Using several different formulations to reflect its analysis and express its views, the appeals court concluded that where the practice at issue unquestionably operated to screen-out people with disabilities, the location where the practice took place was less important than what the results of the practice were. Because the "fast finger" system ultimately prevented people with disabilities from entering the studio as contestants, that practice had to be understood as a denial of access to a public accommodation. Some key language from the opinion of the court will help to put these findings in context:

"The district court dismissed Plaintiffs' complaint upon finding that, because the automated telephone contestant selection process was not conducted at a physical location, it was not a place of "public accommodation" under the ADA.... For the reasons discussed below, we conclude that Plaintiffs state a valid Title III claim in alleging that the contestant hotline was a discriminatory procedure that screened out disabled persons aspiring to compete on Millionaire, a place of public accommodation.... The ADA also precisely defines the term "discrimination" in section 12182(b)(2)(A)(i), which, inter alia, prohibits the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered.... At this juncture, on the record before us, this case does not involve issues regarding the reasonableness of any proposed accommodations, or require us to resolve whether any proposed accommodations or auxiliary services would constitute an "undue burden" to the Millionaire program. Rather, this appeal involves only the question of whether Title III encompasses a claim involving telephonic procedures that, in this case, tend to screen out disabled persons from participation in a competition held in a tangible public accommodation.... Defendants concede that Plaintiffs are disabled as defined by the ADA. Defendants also concede that the Millionaire show takes place at a public accommodation (a studio) within the meaning of 42 USC 12181(7)(C) (covering theaters and other places of entertainment), and that the automatic process used to select contestants tends to "screen out" many disabled individuals as described in section 12182(b)(2)(A)(i).... Defendants concede that the opportunity to appear on "Millionaire" and compete for one million dollars is a privilege or advantage as those terms are defined by the ADA.... Defendants nonetheless contend that they are entitled to dismissal because Plaintiffs have failed to assert that Defendants erected "barriers to the entry of disabled persons into the auditoriums or studios in which the Show is recorded.... As we understand their contention, Defendants argue that the Millionaire contestant hotline may not serve as the basis for a Title III claim because it is not itself a public accommodation or a physical barrier to entry erected at a public accommodation. We find this argument entirely unpersuasive.... There is nothing in the text of the statute to suggest that discrimination via an imposition of screening or eligibility requirements must occur on site to offend the ADA.... Defendants urge us to hold, in effect, that so long as discrimination occurs off site, it does not offend Title III. We do not believe this is a tenable reading of Title III; indeed, off-site screening appears to be the paradigmatic example contemplated in the statute's prohibition of "the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability.... Furthermore, the fact that the plaintiffs in this suit were screened out by an automated telephone system, rather than by an admission policy administered at the studio door, is of no consequence under the statute; eligibility criteria are frequently implemented off site-for example, through the mail or over the telephone."

If asked to state the central point of the Eleventh Circuit's *Rendon* decision, it would have to be that "nexus" is the test of Title III's application to off-site, nonphysical actions and procedures. [fn 57] If the screening mechanism or practice has a connection to the public accommodation, that is, if it actually constitutes a barrier to access by people with disabilities, it will be covered by Title III, at least in the Eleventh Circuit, and as we shall see in other Circuits (each Circuit comprises four or five states) that have in other ways come to the same conclusion.

Like any important case, the *Rendon* decision points the way to new questions even as it answers old ones. For our purposes, the key questions are these: Would it have made a difference if, instead of being the only means of becoming a contestant, the fast finger selection process had been one of several alternative starting points, not the best, not the simplest, but also not the only? And what if there had ultimately been no physical public accommodation, like a TV studio, involved? If the end-result of the selection process had been competition in an online Quiz Show only, would there have been enough of a nexus with a public accommodation to justify the jurisdiction of Title III? Another case now pending in the very same Eleventh Circuit should answer at least one of these questions.

In October, 2002, four months after *Rendon* was decided by the appeals court, the U.S. District Court for the Southern District of Florida decided the case of Access Now Inc. v. Southwest Airlines Co. [fn 58] In Southwest Airlines, the plaintiffs alleged that owing to the lack of alternative text (alt text) for graphic information presented on the computer screen, and due to other features of its design, Southwest Airlines' Web site was inaccessible to blind persons. This, the complaint further alleged, was a violation of Title III of the ADA, because it denied blind persons access to the public accommodation of the Web site and for several other reasons. [fn 59]

The trial court granted summary judgment to the defendant (meaning among other things that there was no trial), dismissing the case and writing the first published and reported Federal court opinion directly addressing the status of Web sites under Title III of the ADA. In the view of this court it had none. The following excerpts from the opinion are indicative of the court's thinking and mode of analysis in reaching its decision:

"Southwest's Internet Web site, Southwest.com, provides consumers with the means to, among other things, check airline fares and schedules, book airline, hotel, and car reservations, and stay informed of Southwest's sales and promotions.... Approximately 46 percent, or over $500 million, of its passenger revenue for first quarter 2002 was generated by online bookings via Southwest.com.... Southwest prides itself on operating an Internet Web site that provides "the highest level of business value, design effectiveness, and innovative technology use achievable on the Web today" (citation omitted). "Despite the apparent success of Southwest's Web site, plaintiffs contend that Southwest's technology violates the ADA, as the goods and services offered on Southwest.com are inaccessible to blind persons using a screen reader.... Plaintiffs' four-count complaint seeks a declaratory judgment that Southwest's Web site violates the communication barriers removal provision of the ADA (count i), violates the auxiliary aids and services provision of the ADA (count ii), violates the reasonable modifications provisions of the ADA (count iii) and violates the full and equal enjoyment and participation provisions of the ADA (count iv).... Plaintiffs have failed to state a claim upon which relief can be granted." "As in all such disputes, the court must begin its analysis with the plain language of the statute in question. Title III of the ADA sets forth the following general rule against discrimination in places of public accommodation": "Here, to fall within the scope of the ADA as presently drafted, a public accommodation must be a physical, concrete structure. To expand the ADA to cover "virtual" spaces would be to create new rights without well-defined standards.... Plaintiffs have not established a nexus between Southwest.com and a physical, concrete place of public accommodation.... Although Internet Web sites do not fall within the scope of the ADA'S plain and unambiguous language, plaintiffs contend that the court is not bound by the statute's plain

language, and should expand the ADA'S application into cyberspace.... Whereas the defendants in *Rendon* conceded, and the Eleventh Circuit agreed, that the game show at issue took place at a physical, public accommodation (a concrete television studio), and that the fast finger telephone selection process used to select contestants tended to screen out disabled individuals, the Internet Web site at issue here is neither a physical, public accommodation itself as defined by the ADA, nor a means to accessing a concrete space such as the specific television studio in Rendon.... Although plaintiffs contend that this is a case seeking equal access to Southwest's virtual 'ticket counters' as they exist "on-line," the Supreme Court and the Eleventh Circuit have both recognized that the Internet is "a unique medium - known to its users as `cyberspace' - located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet (citations omitted).... Thus, because the Internet Web site, Southwest.com, does not exist in any particular geographical location, plaintiffs are unable to demonstrate that Southwest's Web site impedes their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency."

The Southwest decision is currently on appeal to the Eleventh Circuit. For purposes of that appeal, the analysis suggested by one of the amicus briefs filed in the case is particularly instructive, for it suggests how the trial court might have analyzed the case if it had actually followed the approach set out in *Rendon*. [fn 60]

If the trial court had followed *Rendon*, it will have begun by asking whether there is a nexus between the Web site and some physical, public accommodation, such as a travel agency, an airport ticket counter or an aircraft. The Southwest court would have first noted that unlike the fast finger process in *Rendon*, Southwest's Web site is not the only means to buy a ticket. Customers can go to physical locations, such as Southwest's many ticket counters in airports and other locations around the country. But why then did Southwest establish the Web site? Presumably, they sought to make ticket buying and the other activities noted by the court easier for their customers. If that is so, then customers who are systematically denied the use of the Web site would, by definition, be denied the opportunity to benefit and to enjoy equally the services of the airline. Arguably too, the inaccessible Web site would have amounted to a denial of the right to effective communication.

The first question for the court should have been: where the customer with a disability is not totally prevented from buying a ticket--but may only be able to buy it in person, during business hours, after traveling some distance, probably at a higher price, etc.--whether those disadvantages are enough to warrant the finding that the Web site violates the law. Put another way, do the higher cost, greater difficulty, lesser choice and other limitations imposed upon ticket buyers with disabilities who are excluded from the Web site constitute a barrier to access to air travel or a policy or procedure that tend to screen out customers with disabilities?

But the court did not engage in such an analysis or ask any of these questions. In part this may be a result of the way the plaintiffs went about arguing their case. Judging from the opinion and the complaint, it appears that they focused not on the right to accessible information, nor upon the harm and inequality that resulted from denial of such access, but rather on access to the Web site as an end and a right in itself.

Assuming the court had followed the *Rendon* mode of analysis, it would also have had to ask an additional question: if the inaccessible Web site would deprive plaintiffs of equal access to the services of a covered entity, what "place" provides the necessary connection? In the case of the TV quiz show it was clearly the television studio. But here is it the airport, is it a ticket itself, is it the airplane, or is it something else?

Does the inaccessibility of the Web site restrict or deny access to the airport? Arguably yes, because without access to the Web site one cannot purchase a ticket online and therefore cannot printout one's boarding pass before going to the airport. This typically means that time spent in the airport lining up to get a boarding pass will be much longer.

Needless to say, since almost all commercial air lines offer lower fares on their Web sites than in person or over the phone (and of course, under the Southwest court's analysis of the statute, ordering tickets by phone wouldn't be covered by the ADA either), people with disabilities would be forced to pay higher fares than their fellow passengers without disabilities. Apparently, in the view of the Southwest court, charging higher fares to people with disabilities is permissible, so long as it is not done face-to-face. We draw this inference from the fact that nowhere does the opinion suggest the possibility of "equivalent facilitation" or adoption by the air carrier of "alternative methods" for affording the benefits and advantages of Web access, including lower ticket prices and probably superior frequent flyer benefits, to these travelers with disabilities. Nor is there any indication that this or any other airline has ever offered to grant concessionary Web fares to people with disabilities prevented by the inaccessibility of company Web sites from obtaining those fares.

When we turn to the question of access to the airplane (which inaccessibility of the Web site for ticketing and for obtaining scheduling and delay information unquestionably does inhibit, if it does not ultimately prevent), there is an additional problem, one which we believe renders the Southwest decision largely irrelevant to the ADA debate. Commercial aircraft are not public accommodations under Title III. [fn 61] This is not because Congress thought them unworthy of such protection. Rather, it was because access to air travel was protected separately under a different statute, the Air Carrier Access Act (ACAA) of 1986. [fn 62]

Had the district court applied the *Rendon* approach, it might have considered this issue. But the court considered none of these issues, because it assumed, rather than determined, that there was no nexus between the Web site and any other aspect of the airline's services, and that the status of the Web site as a place of public accommodation had to be considered in isolation. But even in its analysis of the Web site in isolation, the court appears to have made a serious error.

Here, our discussion of the critical difference between the statutory words "of" and the all too easily substituted "at" a place of public accommodations must be recalled. We have in this case another substitution, for this court uses the preposition "in" where it should have used "at". In introducing its conclusion that the statute's plain meaning is sufficient to resolve the case, the court stated: "Title III of the ADA sets forth the following general rule against discrimination in places of public accommodation."(emphasis added)

Until or unless the Eleventh Circuit reverses the Southwest decision and remands the case to the district court for further proceedings, we cannot know for certain whether and to what place of

public accommodation a sufficient nexus exists. What if the discrimination were just as palpable and just as indisputable, but no nexus could be found? Say for example that the airline sold no tickets over the counter anywhere, but dealt with its customers only through Web sites? Given the apparent limits of the *Rendon* analysis, do we face a situation where those Web sites which are in some way connected to physical places of public accommodation are covered by Title III while those that are not, that engage in the same commerce with the same customers but operate only via the Web, are not covered? To answer this question we must take what at the outset might appear to be a detour. We must visit a group of cases that deal with the ADA and insurance.

(d) THE INSURANCE PRECEDENTS

It is said that life abhors a vacuum. So do our courts. When faced with a question about which authorities and precedents are not numerous or self-evident, courts will look for whatever is closest and most analogous. Because the issue of Title III's applicability to nonphysical places and things has come to the courts first and still most often in the context of alleged insurance discrimination, these are the cases on which many Internet commentators and some advocates have relied.

In a number of cases people who believed their employers' health insurance discriminated against them have attempted to bring suit against the insurers under Title III of the ADA. Some of the cases have involved benefit caps on certain diagnoses, such as HIV-AIDS, but not on other physical diagnoses, or caps on treatment for mental illness that do not likewise apply to physical conditions. Although there is considerable reason to believe that claims of this nature come under the jurisdiction of Title I and should have been brought by the workers directly against their employers, [fn 63] there is also at least one case involving a claim of discrimination by a couple who sought to buy life insurance directly from an insurance company, and with no involvement of an employer or any other third-party. [fn 64]

As they have worked their way through the courts, these cases have been decided on the basis of whether Title III extends to insurance policies. That in turn has depended on whether a place of public accommodations was deemed to be involved in the sale or administration of the policies. Cases have come to three conclusions on this question: first, a place of public accommodations was involved because the insurance company maintained an office where customers could go; [fn 65] or second, a place of public accommodations was not involved because the insurance was not sold from a physical office or because the public was not invited or admitted to the office; [fn 66] and third, a place of public accommodation does exist because the concept of place need not be limited to a physical location. [fn 67]

Probably the most frequently cited insurance case for application of Title III to events that do not occur at or in close connection with any physical location is *Carparts v. Automotive Wholesaler's Association*. [fn 68] In reaching its conclusion that the ADA did apply to the insurance policy in this case, the U.S. Court of Appeals for the First Circuit stated: "The district court interpreted the term "public accommodation" as "being limited to actual physical structures with definite physical boundaries which a person physically enters for the purpose of utilizing the facilities or obtaining services therein." "Whether establishments of "public accommodation" are limited to actual physical structures is a question of first impression in this Circuit. For the following reasons we find that they are not so limited and remand to the district court to allow plaintiffs the opportunity

to adduce further evidence supporting their view that the defendants are places of "public accommodation" within the meaning of Title III of the ADA. The plain meaning of the terms do not require "public accommodations" to have physical structures for persons to enter. Even if the meaning of "public accommodation" is not plain, it is, at worst, ambiguous. This ambiguity, considered together with agency regulations and public policy concerns, persuades us that the phrase is not limited to actual physical structures. "By including "travel service" among the list of services considered "public accommodations," Congress clearly contemplated that "service establishments" include providers of services which do not require a person to physically enter an actual physical structure. Many travel services conduct business by telephone or correspondence without requiring their customers to enter an office in order to obtain their services. Likewise, one can easily imagine the existence of other service establishments conducting business by mail and phone without providing facilities for their customers to enter in order to utilize their services. It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result. [fn 69]

Another leading insurance case favoring the application of the ADA to the Internet derives its status from two sources. First, the opinion of the U.S. Court of Appeals for the Seventh Circuit in Doe v. Mutual of Omaha [fn 70] was written by the influential and respected Chief Judge Richard Posner. Second, the decision explicitly refers to cyberspace. Interpreting the meaning of "place of public accommodation" the court says: "The core meaning of this provision plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, Web site, or other facility (whether in physical space or in _electronic space), that is open to the public cannot exclude disabled people from entering the facility and, once in, from using the facility in the same way that the nondisabled do" (emphasis added). [fn 71]

Of course, as indicated in note 66 above, there are also a significant number of decisions holding that Title III does not apply to insurance. Some of these cases stress the distinction between access to facilities or to services as opposed to the contents of goods or services, suggesting that if the issue had been the refusal of the insurers to make any coverage at all available to people with disabilities (as distinguished from offering different coverage to people based on various disabilities), the results might have been different. Other cases, which held that there was no connection or nexus between the insurance policy and a physical location, and hence rejected the applicability of Title III, might well have allowed the claims, even though they involved the content of insurance as opposed merely to access to insurance, if the nexus to a physical location had been established. [fn 72]

Suffice it to say, no case has been found that would treat access to insurance (as distinguished from the content of the coverage) as beyond the scope of Title III, if the insurance were ordinarily accessible to the public through a physical facility. Even the leading case for the proposition that Title III does not apply to insurance, Parker v. Metropolitan Life Insurance Co. [fn 73] may not be as opposed to Title III coverage as it is often portrayed. This is because of language in the opinion suggesting that insurance sold to employers couldn't be a public accommodation, whether sold to them from a physical facility or not. [fn 74] If the insurance, because sold at wholesale and only to employers, couldn't have been a public accommodation, regardless of where it was sold, then how could the question of where it was sold be a meaningful issue in the case?

Among the cases that treat the nexus between insurance and a physical facility as decisive, there appears to be little effort to explain or to justify why Congress would have intended or countenanced such a distinction between cases of discrimination that the law covers and cases it does not, especially where the line between what constitutes and what does not constitute a sufficient connection is so unclear and imprecise. Beyond insisting that either the plain meaning of the text or their reading of the legislative history [fn 75] dictate this outcome, however unworkable it might be, the "no" cases have little to say about why, when faced with a choice between two interpretations of the plain meaning of the law that can each be argued plausibly and even convincingly, they should work so hard to justify the reading of the law that would lead to a strained if not tortured result over the alternative interpretation that would be practical to implement and sensible to apply.

V. THE MEANING OF "PLACE"

Although the weight of the authorities as well as the imperatives of effective civil rights enforcement argue in favor of an interpretation of the law that would do away with the necessity for involvement of a physical location, current judicial attitudes toward the ADA suggest that this reading of the law is unlikely on the part of most courts, and certainly on the part of the Supreme Court when, as seems inevitable, the matter finally reaches there. But the problems surrounding the word "place," coupled with widespread hostility to extension of civil rights protection or to further regulation of the Internet, point to the conclusion that this sensible and viable solution of eliminating the need for a physical place may not find general favor and acceptance.

Faced with these realities, and desiring to find an approach that both promotes consensus among analysts and fosters a reading of the statute that gives meaning to all its words and intentions, much may be gained by looking at the issue of place in a new way. Accordingly, let us ask what is the meaning of "place." If some connection to a location or facility is going to be required for Title III to come into play, it behooves us to probe what "location" or "facility" ultimately mean.

In its regulations implementing Title III of the ADA, the DOJ defines the term "facility," as follows: "Facility means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located." ([fn 76]]

Here the word "equipment" is particularly intriguing. The servers on which Web sites run may well be regarded as constituting "equipment" within the meaning of the regulation. These servers are located at a place or places. These are not places where the public go, but if we remember the critical distinctions among prepositions, and bear in mind that the public need not be "at" or "in" the facility, then it may not be too far-fetched to propose that even under the narrow definition of the law, Web sites, providing as they do their goods and services from equipment in places that are owned or leased by the public accommodations or by commercial facilities, and to any member of the public who cares to log-in or click on them, qualify as places of public accommodation.

Another approach that should strongly commend itself to consideration and discussion involves again not necessarily abandoning the notion of "place" but fundamentally redefining what place means. Just as the computer age has led to the realignment of so many of our basic concepts, it may be appropriate to consider how cyberspace has altered our notion of place. Here Judge Posner's words in the Doe v. Mutual of Omaha case – "whether in physical space or in electronic space"- [fn 77] are especially worth remembering and exploring.

With the passage of time, as more and more goods, services, informational resources, recreation, communication, social and interactive activities of all kind migrate, wholly or partly, to the Net, maintenance of legal distinctions among otherwise similar Web sites, based on their connection or lack of connection to a physical facility, will become increasingly untenable and incoherent. Were there no nexus doctrine, and were all Web sites to be per se excluded from coverage, the law, however unjust, would at least be clear. But now that we see the direction in which the law, even in the hands of its most cautious interlocutors, is moving, the effort to define what is a sufficient nexus and to determine whether it exists in each particular case will surely continue. Use of the nexus approach, preferable as it may be to civil rights advocates over an approach that categorically excludes the Web from coverage, may, however, result in far more havoc than even the most sweeping and inclusive requirement for across-the-board commercial Web site accessibility ever could. Consider the impossibility of the situation. One online grocery company operates in conjunction with local pickup points, where customers, after transmitting their orders electronically, go several hours later to pick up their orders. Another online grocery company delivers. Well, since access to the goods and services of the first purveyor involves going to a physical location and since the goods cannot be obtained without first going on the firm's Web site, a tight nexus, at least as strong as that shown in *Rendon*, exists. The Web site of company number one therefore has to be accessible. Meanwhile, company number two appears to be totally exempt from the law, since the customer never goes to any physical location. And what if company three gives its customers several alternatives including pick up or delivery? Does its Web site have a sufficient nexus with a physical location to be covered by the law, or is the existence of a no-visit option sufficient to render it exempt? Or could it be that company three's Web site is subject to accessibility requirements for those users who elect to pickup their groceries but need not be accessible to customers who opt for home delivery? Could it be that even a firm that delivers all orders becomes subject to accessibility requirements because, as the place where its employees and the customer interact, the purchaser's home becomes a place of public accommodation for the time required to make the delivery? In sum, is such a system, making some commercial Web sites subject to the ADA while leaving other, similar companies outside the coverage of the law, and creating never-ending uncertainty for everyone, tolerable? Is it workable for the customers, fair to the merchants, enforceable by the administrative agencies or the courts?

It should also be remembered that more hinges on our answer to the Internet access question than might at first appear. For if the Internet is excluded from coverage under Title III because it is not a physical location, or if Internet-only commerce is excluded from coverage for lack of a nexus, then under what logic can telephone, postal or any other form of nonface-to-face interaction or commerce be covered? The individual with a disability no more goes to the public accommodation's post office box or call center than to its Web server. The person with a disability who takes online courses does not go to the campus of the private university. And the individual with a disability who sends a medical home-test kit to a laboratory for analysis never goes

anywhere near the laboratory's premises. Yet, if Internet-based transactions were excluded from coverage under Title III because of no nexus, the same outcome would logically follow for all these and many other interactions.

Our law and commitments have already moved too far for categorical exclusion of the Web to be possible. But the alternative of nexus which our courts have used so far is not a satisfactory solution either. Only a clear recognition of the seamlessness of commerce, entertainment, education and health care makes any legal, economic or administrative sense. And even assuming that online information or opportunities could be made available and accessible to people through the use of some alternative methods, through the provision of auxiliary aids and services, or through other forms of equivalent facilitation, it should be remembered that if the Web site is not deemed a place of public accommodation, if the Web site is not required to be accessible, then there is no legal basis for requiring that its contents or opportunities be provided by any means. If accessibility is not required of a Web site, then nothing is required of it. Its owners and operators could refuse to serve people with disabilities, could (say in an effort to avoid having demands for accessibility made upon them) take active measures to identify and exclude users with disabilities, and could do these and other outrageous things with total impunity, so far as civil rights laws are concerned.

Faced with fear and unease over perceived attacks on their civil rights and recently-won quality of life gains from many quarters, already in many cases more apprehensive for the future than other Americans, this added burden of disillusionment and doubt is not something that Americans with disabilities need, and at a time of persisting national peril when our need for unity and for galvanizing the positive energies of all our citizens, it is the last thing America needs. Not only is cyberspace a place, it is the place where some of the most dynamic and far-reaching initiatives in our society are taking place. It is a place from which the law should countenance the exclusion of no one.

VI. IMPLEMENTING ACCESSIBILITY STANDARDS

(a) THE CONTEXT

The debate over whether private, commercial Web sites should be subject to accessibility requirements is ultimately a debate about far more than the ADA. It is variously a debate over the role of government, over the proper regulation of the Internet and over other large issues. Bearing in mind, as we shall discuss later in this Section, that the requirements involved would be unobtrusive, inexpensive and easily accomplished, it is important to note that the small amount of additional regulation implicated in Web access does not dramatically alter the environment or the expectations of cyberspace. However it may once have been that the Internet existed in an environment of total legal freedom, regulated only by the shared values and customs of its users, [fn 78] that day has long passed. Today, as the integral part of the economy and society that it has rapidly become, the Internet is subject, for better or for worse, to all the laws, strains and contradictions of other major institutions. Its struggles to accommodate user freedom, on the one hand, with intellectual property rights and decency on the other; its efforts to balance ease of access and use with security and privacy; its liability to taxation, its role and responsibility in the dissemination of news--in all of these areas its recent history and current disputes have far more in

common with other institutions than with the largely mythic world of anarchic self-regulation by a small group of elite and like-minded techno and academic users.

In this light, calls for, and expectations of, accessibility and inclusion by people with disabilities should come as no surprise. What may still come as something of a surprise to some, however, is that accessibility can be defined and implemented in ways that are not financially burdensome to the providers or users of Web-based services, that do not impose rigid or restrictive design requirements on operators, and that do not subject companies to perpetual fear or uncertainty at the prospect of some regulatory bureaucrat swooping down on them for serious or trivial violations. Just such limited understanding of the relevant underlying technology and of the role of accessibility guidelines appears, judging from one of the opinion's foot notes, to have played a role in the Southwest decision. [fn 79]

Despite the unfounded nature of these and other concerns, their continued existence, repetition and exaggeration are not unlikely. Some of this fear undoubtedly results from genuine ignorance, misunderstanding or reflexive distrust of all government. But all too much of it may reflect other political and economic agendas. Lest policymakers, commercial entities engaged in commerce via the Internet, Webmasters or others be unduly influenced by the fears that abound, several key facts should be noted. First, other major industrial nations, operating under disability rights laws modeled on the ADA, have adopted Web accessibility guidelines. [fn 80] In England and Australia for example these have been extended to the private sector. [fn 81] We have found no indications that such requirements as applied in any of the European or in several Asian nations have resulted in difficulty or disruption.

While it may be argued that the experience and conditions of other nations cannot predict results in this country, our own experience should provide powerful reassurance. A host of private sector entities have voluntarily adopted the Web content accessibility guidelines developed by the Web Accessibility Initiative (WAI) of the World Wide Web Consortium (the W3C). [fn 82] Additionally, many Federal government Web sites (and some private sector sites as well) have been designed or redesigned to comply with the Web accessibility standards of Section 508 of the Rehabilitation Act Amendments of 1998. [fn 83] At the same time, the availability of technical assistance resources for understanding and implementing accessible design principles, the existence of software tools for identifying accessibility shortcomings in Web pages, and the ability of major operating systems to support access software and peripherals have all continued to increase and improve. [fn 84]

Some have expressed concern that owing to differences between the W3C guidelines and the Section 508 Web accessibility standards, imposition of any requirements on the private sector would be confusing or unfair. But as discussed below, there is no reason why, if the Department of Justice exercises the necessary leadership in the matter, any confusion need surround the question of what accessibility standards ought to apply. Indeed, available evidence and trends strongly suggest that it will be in the adoption of clear, broadly applicable standards rather than in their discrediting or delay that chaos and confusion are to be best avoided. In the vacuum that will be created by a failure of federal leadership, a host of voluntary standards, inconsistent state efforts at standards-setting, and legal standards that apply to some portions of Web sites and not others or to some users of Web sites and not others all constitute far greater barriers to order and coherence

than a strong national standard would. To prevent an impractical, wasteful and intolerably confusing situation for industry and the public, key sectors of commerce may be better-served by working together to establish clear and appropriate national standards than by short-sightedly resisting them or seeing them as the thin edge of some mysterious and giant wedge. Without appropriate standards, litigation and uncertainty can only grow, and only if the courts or Congress solve the nexus problem by placing Web access totally outside the purview of disability rights would that growing tide be stemmed. But how, given the progress we have made under 508 and voluntarily in the private sector, could such a halt to progress and to information access in the electronic age possibly be imposed?

Ample resources for giving Web accessibility an objective, verifiable and readily understandable meaning abound, as noted above. The W3C is a consortium of enlightened entities and individuals, including a number of technology and other private sector firms, who understand both the importance of accessibility and the necessity for widely applicable, consensus standards. These guidelines, or the standards adopted for federal agency Web sites under Section 508, have amply demonstrated their value and effectiveness in this area.

(b) WHAT IS REQUIRED

The Americans with Disabilities Act Accessibility Guidelines (ADAAG) contain the specific scoping, measurement and design requirements applicable to achieving and to documenting physical accessibility and barrier removal, as required by the law. The Section 508 electronic and information technology E&IT) access standards, while not embodied in the ADAAG or promulgated under the authority of the ADA, demonstrate that a similar approach is possible with Web access, as the W3C content accessibility and their other guidelines have shown. It is not the purpose of this paper to suggest what standards or combination of guidelines and standards should be adopted from among the several excellent and proven models already in use. It is enough to say that prospective adoption of either the W3C guidelines or the 508 accessibility standards by the operators of commercial Web sites engaged in commerce could be accomplished in the context of regular upgrades and revisions at little add-on cost and with little or no disruption. Use of a reasonable grace period at the outset of the implementation of the guidelines, during which violations would be subject to remedy in lieu of punishment, would further serve to ensure a smooth and effective transition.

(c) JURISDICTIONAL APPROACH

Based on its experience overseeing and evaluating the existing 508 regulations, and its jurisdiction over the ADAAG, the Department of Justice is in an ideal position to take the lead role in implementing national Web site accessibility. Ideally, the Web access guidelines should be incorporated into the ADAAG, where these information access provisions will parallel those bearing on physical access, and where they have long belonged. Like the requirements bearing on the removal of physical barriers, they would be subject to periodic update, and to the degree that changes in computer technology may alter the equation or definition of access, they could be updated as frequently as such advances warrant.

Because of its experience in developing technology access guidelines, [fn 85] we believe DOJ should work with the Access Board in selecting or refining the appropriate standards. Although no one can be certain that the courts would uphold such an exercise of rule-making authority, [fn 86] we believe that the Department has the authority to take these steps, or could be empowered to do so by presidential executive order. But if its own analysis of the matter leads the DOJ to conclude it lacks this authority, then the administration should immediately seek the necessary approval from Congress. [fn 87] Such legislation need not and should not be the occasion for any other amendments to the ADA, and the administration should make its position clear and firm on this point, since attempts to "open-up" the ADA to unrelated amendment would generate so much contention that public and administration attention would almost certainly be massively diverted away from implementation of the goals of the New Freedom Initiative.

Utilization of the ADAAG to incorporate Web-accessibility requirements into Title III of the ADA would have one additional advantage that would benefit business, government and people with disabilities considerably. In addition to clarifying the standards, this approach would resolve the question whether Web access and associated effective communication is an issue that must be approached, as the accessibility of facilities is approached, in the planning of commercial Web sites, or whether accessibility obligations are triggered by individual request. Treated as situation-by-situation responses to individual requests, Web access becomes yet more confused and confusing. If the determination of coverage has to await an individual's request for access, Web site operators will never be certain what is expected of them, people with disabilities will have to wait for Web sites to be fixed before they can use them, and enforcement agencies may have to address standards issues in relation to the needs of a particular complainant. It would be as if the physical-accessibility requirements for a building were left to be determined and applied only on the basis of the access needs of the particular person seeking to gain entry or use. It would be foolish in the physical realm - it is no less so in the informational.

CONCLUSION

What could be more emblematic of freedom in this era, and more in keeping with the goals of the NFI, than an orderly, consensus-driven and inclusive process resulting in the incorporation in our law of demonstrated and effective standards for ensuring that the Internet, that singular engine of progress and change, will not leave millions of Americans, adults and children alike, behind? Today we have the technology, the experience and the technical assistance to bring this about in an orderly, effective and noncoercive way. In light of the path already taken by the law, it is clear that many commercial Web sites will be subject to accessibility requirements. The question therefore is not whether the ADA applies to the Internet, but whether its application is going to be managed in an orderly way, so as to minimize costs and maximize benefits for all, or whether, under the pretext of deregulation, we are going to leave the process to inconsistency, chaos and fear.

Only by taking the lead in addressing the parallels between physical and information access can the federal government hope to achieve the goals of inclusion and access central to the New Freedom Initiative. Given its own determination seven years ago that information access rights are not waived or abrogated simply because information is provided online, it is past time for the Department of Justice to implement that conclusion in a way that American business and consumers can understand and use.

In the past we have been used to talking about the digital divide. The time has come to rephrase our inquiry, and to embrace the digital future for Americans with disabilities as fully as we have sought to grasp it for the population as a whole.

REFERENCES

Fn 1 The Digital Millennium Copyright Act of 1998 (DMCA), PL 105-298.

Fn 2 The Electronic Signatures in Global and National Commerce Act of 2000 (often called the Digital Signature Act), PL 106-229.

Fn 3 See, e.g., Comment. *Locating Discrimination: Interactive Web Sites As Public Accommodations Under Title II Of The Civil Rights Act*, by Tara E. Thompson, 2002 U. Chicago Legal Forum 409 (2002) (analysis, including by analogy to cases decided under the ADA, of the application of religious and other discrimination issues to the Internet).

Fn 4 For an explanation and documentation of the digital divide, see the report *Falling Through The Net: Toward Digital Inclusion, A Report On Americans' Access To Technology Tools* (U.S. Department of Commerce, October 2000) (currently available on the Internet at http://www.ntia.doc.gov/ntiahome/digitaldivide/).

Fn 5 Compare, *The Growing Digital Divide in Access for People with Disabilities: Overcoming Barriers to Participation*, by Cynthia Waddell (1999) (currently available at http://www.icdri.org/the-digital-divide.htm).

Fn 6 For legal analyses concluding that Title III does extend to the Internet, see, *Americans with Disabilities Act and the Internet*, by Jonathan Bick, 10 Albany L. J. of Science & Technology 205, at 206-08 (2000); Note. *Interpreting "Place of Public Accommodation" under Title III of the ADA: A Technical Determination with Potentially Broad Civil Rights Implications*, by Matthew A. Stowe, 50 Duke L J 297, at 298-99 and 327-28 (2000); Note. *Was Blind but Now I See: The Argument for ADA Applicability to the Internet*, by Jeffrey Scott Ranen, 22 BC Third World L. J. 389 (2000); *Providing Access to the Future: How the Americans with Disabilities Act Can Remove Barriers in Cyberspace*, by Cassandra Burke Robertson, 79 Denver U. L. Rev. 199 (2001); *Web-sight For Visually-abled People: Does Title III of the Americans with Disabilities Act Apply to Internet Websites?* by Adam M. Schloss, Columbia J. of L. and Social Problems 35 (2001).

Fn 7 For legal analyses finding that Title III does not extend to the Internet, see, Comment. *An Analysis of the Applicability of Title III of the Americans with Disabilities Act to Private Internet Access Providers*, by Kelly Konkright, 37 Idaho L. Rev. 713 at 723 and 727 (2001); *The Wrong Tool for the Right Job: Are Commercial Websites Places of Public Accommodation Under the*

Americans with Disabilities Act of 1990?, by Patrick Maroney, 2 Vanderbilt J. Entertainment L. & Prac. 191 at 204 (2000).

For analyses taking no position on the answer, see, *The Americans with Disabilities Act and the Internet*, by Paul Taylor, 7 BU J. Science & Technology L. 26 (2001).

Fn 8 The Applicability of the Americans with Disabilities Act to Private Internet Sites: Hearings before the House Subcommittee on the Constitution of the House Committee on the Judiciary (106th Cong. Second Session Feb. 2000) (currently available at http://www.house.gove/judiciary.htm).

Fn 9 NCD's policy brief series, Righting The ADA, includes 16 important background papers thus far. These are: Policy Brief No. 1, *Righting the ADA: Introductory Paper: The Americans with Disabilities Act* (NCD October 16, 2002)(http://www.ncd.gov/newsroom/publications/rightingtheada.html#ma9); No. 2, *A Carefully Constructed Law* (NCD October 30, 2002) (http://www.ncd.gov/newsroom/publications/carefullyconstructedlaw.html)main); No. 3, *Significance of the ADA Finding That Some 43 Million Americans Have Disabilities* (NCD November 15, 2002) (http://www.ncd.gov/newsroom/publications/43million.html#main);No. 4, *Broad Or Narrow Construction of the ADA* (NCD December 16, 2002) (http://www.ncd.gov/newsroom/publications/broadnarrowconstruction.html#ma9); No. 5, *Negative Media Portrayals of the ADA* (NCD February 20, 2003) (http://www.ncd.gov/newsroom/publications/negativemedia.html#main); No. 6, *Defining "Disability" in a Civil Rights Context: The Courts' Focus on Extent of Limitations as Opposed to Fair Treatment and Equal Opportunity* (NCD February 13, 2003) (http://www.ncd.gov/newsroom/publications/extentoflimitations.html#main); No. 7, *The Impact of the Supreme Court's ADA Decisions on the Rights of Persons With Disabilities* (NCD February 25, 2003) (http://www.ncd.gov/newsroom/publications/decisionsimpact.html#main); No. 8, *The Americans with Disabilities Act: The Implications of the Supreme Court's Decision in Board of Trustees of the University of Alabama v. Garrett* (NCD February 26, 2003) (http://www.ncd.gov/newsroom/publications/alvgarrett.html#main); No. 9, *Chevron v. Echazabal: The ADA's "Direct Threat to Self" Defense* (NCD February 27, 2003) (http://www.ncd.gov/newsroom/publications/directthreat.html#main); No. 10, Reasonable Accommodation After Barnett (NCD March 5, 2003) (http://www.ncd.gov/newsroom/publications/accommodation.html#main); No. 11, *The Role of Mitigating Measures in the Narrowing of the ADA 'S Coverage* (NCD March 17, 2003) (http://www.ncd.gov/newsroom/publications/mitigatingmeasures.html#main); No. 12, *The Supreme Court's ADA Decisions and Per Se Disabilities* (NCD March 19, 2003) (http://www.ncd.gov/newsroom/publications/persedisabilities.html#main); No. 13, *The Supreme Court's ADA Decisions Regarding Substantial Limitation of Major Life Activities* (NCD April 29, 2003) (http://www.ncd.gov/newsroom/publications/limitation.html#ma9); No. 14, *The Supreme Court's ADA Decisions Regarding the Not-Just-One-Job Standard* (NCD May 20, 2003) (http://www.ncd.gov/newsroom/publications/notjustonejob.html#main); No. 15, *The Supreme Court's Decisions Discussing The "Regarded As" Prong Of The ADA Definition Of Disability* (NCD May 21, 2003) (http://www.ncd.gov/newsroom/publications/regardedas.html);No. 16, *The*

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Supreme Court's Decisions Regarding Validity And Influence of ADA Regulations (NCD June 4, 2003) (http://www.ncd.gov/newsroom/publications/validityandinfluence.html#main).

Fn 10 e.g., the ADA technical assistance manuals published by the Department of Justice and by the EEOC. See also, Note 84, infra.

Fn 11 42 USC Sec. 12101 et seq. at Secs. 12111-12117; for implementing regulations 29 CFR Part 1630 et seq.

Fn 12 42 USC Sec. 12101 at Secs. 12131-12135; for implementing regulations 28 CFR Part 35

Fn 13 42 USC Sec. 12101 at Secs. 12181-12189; for Department of Justice implementing regulations 28 CFR Part 36

Fn 14 42 USC Sec. 12111 (2) and (5); for Equal Employment Opportunity Commission regulations defining employer, 29 CFR Sec. 1630.2 (e).

Fn 15 For an overview of the scope of this concept, see 29 CFR Sec. 1630.4 (EOOC implementing regulations).

Fn 16 42 USC Sec. 12111 (10); for a review of case law in this area, see, Note. *Overcoming A New Digital Divide: Technology Accommodations and The Undue Hardship Defense Under The Americans with Disabilities Act*, by Mary L. Dispenza, 52 Syracuse L. Rev. 159 (2002).

Fn 17 Cathcart v. Flagstar Corp., No. 97-1977, 1998 App. Lexis 14496 (unpublished 4th Cir. 1998).

Fn 18 e.g., Kiel v. Select Artificials Inc., 169 F. 3d 1131 (8th Cir., cert. denied, 120 S. Ct. 59 (1999).

Fn 19 See generally, *Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before A Jury?* A Response to Professor Colker, by Jeffrey A. Van Detta, 19 Review of Litigation 505 (2000).

Fn 20 67 Federal Register 78790 (December 26, 2002).

Fn 21 *Fact Sheet: Work at Home: Telework as a Reasonable Accommodation (Equal Employment Opportunity Commission*, February, 3, 2003) (currently available at http://www.eeoc.gov/facts/telework.html).

Fn 22 29 USC Sec. 794d; for interpretation and standards, 36 CFR Part 1194.

Fn 23 29 USC Sec. 504

Fn 24 e.g., California Government Code Sec. 11135. For a discussion of state disability discrimination laws that go beyond the ADA see, NCD Policy Brief No. 6, at Note 9, supra.

Fn 25 28 CFR Sec. 35.140 (b)(1); Zimmerman v. State of Oregon Dept. of Justice, 170 F. 3d 1169 at 1177-78 (9th Cir. 1998).

Fn 26 42 USC Sec. 12131.

Fn 27 42 USC Sec. 12132.

Fn 28 Id.

Fn 29 U.S. Department of Education, Office for Civil Rights, Region IX, Letter to Loyola Marymount University (Docket No. 09-91-2157, January 15, 1992); Letter to Los Rios Community College (Docket Nos. 09-93-2214-I, 09-93-2215-I, 09-93-2216-I, April 21, 1994); Letters to California State University, San Jose (Docket No. 09-95-2206, January 25, 1996) and (Docket No. 09-96-2056, February 7, 1997); Letter to CSU, Los Angeles (Case Docket No. 09-97-2002, April 7, 1997); Letter to CSU, Long Beach (Docket No. 09-99-2041, April 20, 1999). Compare, OCR Region II, Letter to Patricia Bromberger (Case No. 02-95-2145, March 29, 1996) (findings in regard to complaint against Brooklyn College). These OCR findings and settlement agreements can be accessed through http://www.rit.edu/~easi/law.htm#case.

Fn 30 42 USC Sec. 12102 (a); see also 28 CFR Sec. 35.104 (for examples of auxiliary aids and services used to facilitate effective communication).

Fn 31 San Jose Letter (January, 1996) Note 29, supra. Because this complaint was adjudicated prior to the emergence of the concept of Web accessibility, it involved the responsibility of the college to provide technology to the user that would facilitate independent access to the Internet. Lest it be argued today that readers or other human assistants are equal or superior methods for obtaining access to the Web, the following observations of the OCR in its findings letter are worth noting:

"OCR notes that the "information superhighway" is fast becoming a fundamental tool in post-secondary research. Rather than implementing adaptive software, some institutions have attempted to utilize personal reader attendants as the exclusive or primary way of making this form of computer information accessible to persons with visual impairments. In most cases, this approach should be reconsidered. One of the most important aims in choosing the appropriate auxiliary aid has been to foster independence and autonomy in the person with a disability. When reasonably priced technology is available that will enable the visually impaired computer user to access the computer, including the World Wide Web, during approximately the same number of hours with the same spontaneous flexibility that is enjoyed by other nondisabled computer users, there are many reasons why the objectives of Title II will most effectively and less expensively be achieved by obtaining the appropriate software programs." "Although there may be limited circumstances when a personal reader is needed to bridge the gap in accessibility provided by adaptive software programs, this gap is continually being narrowed and post-secondary institutions are expected to stay apprised of recent advances."

Fn 32 OCR Long Beach letter, Note 29, supra.

Fn 33 Americans with Disabilities Act Accessibility Guidelines (ADAAG), Sec. 4.34 (currently available at http://www.access-board.gov/adaag/html/adaag.htm#4.34).

Fn 34 Complaint filed with the Federal Transit Administration by Randy Tamez against the San Francisco Metropolitan Transportation Commission (November, 1998). For a summary, see *Disabled Web Surfer's Case May Prove a Bellweather for Accessibility Standards*, by Patrick Riley (November 20, 1998) (http://ncam.wgbh.org/news/Webnews7.html). Various articles in such mass circulation media as the Washington Post and San Francisco Examiner, and articles in such disability-oriented publications as the Disability Rag, also discussed the complaint at length.

Fn 35 Martin v. Metropolitan Atlanta Rapid Transit Authority, 24 NDLR 245(N.D.Ga. Civil Action No. 1:01-CV-CBEE-TWT, 1:01-CV-3255-twt October 7, 2002).

Fn 36 Id.

Fn 37 42 USC Sec. 12182.

Fn 38 42 USC Sec. 12182 (a).

Fn 39 42 USC Sec. 12181 (7).

Fn 40 42 USC Sec. 12181 (1).

Fn 41 42 USC Sec. 12181 (2).

Fn 42 Letter from the Assistant Attorney-General for Civil Rights to Senator Tom Harkin, (September 9, 1996), 10 NDLR 240 (currently available at http://www.usdoj.gov/crt/foia/cltr204.txt).

Fn 43 e.g., Amicus Brief of the US Department of Justice, filed in the Fifth Circuit in the case of Hooks v. OKBridge (No. 99-50891) See Fn #50 (currently available at http://www.usdoj.gov/crt/briefs/hooks.htm), and the Department's 11th Circuit amicus brief in Rendon (currently available at http://www.usdoj.gov:80/crt/briefs/rendon.pdf).

Fn 44 e.g., http://www.ada.gov/aprjun02.htm (credit card statement in large print). Recognizing the value of effective communication with their customers, numerous public utilities and financial services companies have proactively offered or responded to requests to make statements, bills and inserts available to clients prevented by disability from reading print).

Fn 45 http://www.icdri.org/city-of-san-jose-world-wide-Web.htm. See generally, U.S. Accessibility Law, by Cynthia Waddell, in Constructing Accessible Web Sites, Chap. 13, at Note 84, infra.

Fn 46 National Federation of the Blind, Inc v. AOL Time Warner, Inc., (Civil Action No 99-12303 (D Mass) complaint filed November 16, 1999) (http://www.education-rights.org/nfbvaol.html).

Fn 47 e.g., Group Behind Blind-Access Suit Resolves Suit with AOL, by Hiawatha Bray, Boston Globe at E4 (July 27, 2000).

Fn 48 http://www.corp.aol.com/access_policy.html.

Fn 49 *Will the National Federation of the Blind Renew Their ADA Web Complaint Against AOL?* by Cynthia D. Waddell, 18 NDLR (DCB) - (August 24, 2000).

Fn 50 Hooks v. OKBridge, Inc. (Civ. No. 99-50891, unpublished 5th Cir. August 21, 2000).

Fn 51 Note 43, supra.

Fn 52 As the brief points out, the Supreme Court made this mistake, initially concluding that the Fourth Amendment did not apply to telephone conversations but later correcting itself as the telephone became more central to our lives.

Fn 53 Dean v. Ashling, 409 F. 2d 754 at 755 (5th Cir. 1969).

Fn 54 Miller v. Amusement Centers. Inc., 394 F. 2d 342 (5th Cir. 1968).

Fn 55 Rendon et al. v. Valleycrest Productions Ltd., 294 F. 3d 1279 (11th Cir. 2002), reh'g denied en banc, 2002 U.S. App. LEXIS 27593 (October 25, 2002).

Fn 56 Rendon v. Valleycrest Productions Ltd., 2000 U.S. District No. 15776 (S.D.Fla) (2000).

Fn 57 Rendon, Note 55, supra at N8.

Fn 58 Access Now Inc. v. Southwest Airlines Co., 227 F. Supp. 2d 1317 (S.D.Fla.) (2002).

Fn 59 see Complaint in Access Now Inc. and Gumson et al. v. Southwest Airlines Inc. (Case No. 02-21734-civ S.D.Fla. 2002).

Fn 60 Access Now, Inc., and Robert Gumson, et al, Plaintiffs-Appellants v. Southwest Airlines, Inc., Defendant-Appellee, (No. 02-16163-Bb, Brief Of Amici Curiae In Support Of The Plaintiffs-Appellants And In Support Of Reversal, filed March 17, 2003 by Goldstein, Demchak, Baller, Borgen & Dardarian, on behalf of amici American Association Of People With Disabilities, American Council Of The Blind, American Foundation For The Blind, Bazelon Center For Mental Health Law, Disability Rights Advocates, Disability Rights Education And Defense Fund, National Association Of The Deaf, National Association Of Protection And Advocacy Systems, And National Federation Of The Blind).

Fn 61 H.Rather. Rep. 101-485, Part II at 87, 1990 WL 125563. Cf., Squire v. United Airlines, 973 F. Supp. 1004 at 1009 (D. Colo. 1997), aff'd. 194 F. 3d 1321 (10th Cir. 1999); All Hawaii Tours, Corp. v. Polynesian Cultural Center, 116 FRD 645 at 651 (D. Haw. 1987), rev'd. on other grounds, 855 F. 2d 860 (9th Cir. 1998).

Fn 62 The Air Carrier Access Act of 1986 (ACAA), 49 USC Sec. 41705.

Fn 63 The Limits of Coverage: Do Insurance Policies Obtained Through an Employer and Administered by Insurance Companies Fall Within the Scope of Title III of the Americans with Disabilities Act?, by Karen Volkman, 43 ST. LOUIS U. L. J. 249 (1999); The Impact of Title III of the Americans with Disabilities Act on Employer-Provided Insurance Plans: Is the Insurance Company Subject to Liability?, by Jill L. Schultz, 56 Wash. & Lee L. Rev. 343 at 372 (1999).

Fn 64 Cf., Morgan v. Joint Administration Board, 268 F. 3d 456 at 457-59 (7th Cir 2001) (because employee received her insurance through employer, it was a private offering and not a public accommodation); Parker Note 66, infra at 1011-12 (insurance sold only to employer not a public accommodation).

Fn 65 Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n. of New England, Inc., 37 F. 3d 12 at 19-20 (1st Cir. 1994); Pallozzi v. Allstate Life Ins. Co., 198 F. 3d 28 at 32-33 (2d Cir. 1999); Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158 at 1165 (E.D.Va. 1997), vacated on other grounds, 180 F. 3d 166 (4th Cir. 1999); Mcationeil v. Time Ins. Co., 205 F. 3d 179 at 186 (5th Cir. 2000); Baker v. Hartford Life Ins. Co., 1995 U.S. Dist. LEXIS 14103 (N.Do. Ill. 1995); Kotev v. First Colony Life Ins. Co., 927 F. Supp. 1316 at 1321 (CD Cal. 1996); Doukas v. Metropolitan Life Ins. Co., 950 F. Supp. 422 at 425 (DNH 1996); Cloutier v. Prudential Ins. Co. of America, 964 F. Supp. 299 at 302 (ND Cal. 1997); Winslow v. IDS Life Ins. Co., 29 F. Supp. 2d 557 at 561-63 (D. Minn. 1998). Compare, Shultz v. Hemet Youth Pony League, Inc., 943 F. Supp. 1222 at 1225-26 (CD Cal. 1996); Digital Equip. Corp. v. Altavista Technology, Inc., 960 F. Supp. 456 at 459 n.2 (D. Mass 1997); and Walker v. Carnival Cruise Lines, 63 F. Supp. 2d 1083 (ND Cal. 1999). Winslow v. IDS Life Ins. Co., 29 F. Supp. 2d 557 at 561-63 (D. Minn. 1998).

Fn 66 Parker v. Metropolitan Life Ins. Co., 121 F. 3d 1006 (6th Cir. 1997); Ford v. Schering-Plough Corp., 145 F. 3d 601 at 612-14 (3d Cir. 1998); Schaff v. Association of Educ. Therapists, No. C94-0315 CW, 1995 U.S. Dist. LEXIS 21806 (ND Cal. 1995).

Fn 67 Several of the cases in Note 65, supra, state, or can be read to conclude, that no physical structure or location is required for the law to apply. Others hold that some nexus to a physical location or to commerce will suffice.

Fn 68 Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England, 37 F. 3d 12 (First Cir. 1994).

Fn 69 37 F. 3d 12 at 19.

Fn 70 Doe v. Mutual of Omaha Ins. Co., 179 F. 3d 557 (7th Cir. 1999), cert. denied, 528 US 1106 (2000).

Fn 71 179 F. 3d 557 at 559.

Fn 72 Compare, e.g., Mcationeil, Note 65 supra with Doukas, Note 65 supra.

Fn 73 Parker, Note 66, supra.

Fn 74 121 F. 3d 1006 at 1010-14.

Fn 75 For the admittedly inconclusive legislative history on the physical location question, see, e.g., S. Rep. No. 101-116 (101st Cong. First Session 1989) at 6, 10 and 58; H. Rep. No. 101-485, Parts I-IV, at 35-36, 54 and 56 (101st Cong. Second Session 1990); House Conf. Rep. 101-558 at 41 (101st Cong. Second Session 1990); and HR Conf. Rep. 101-596 at 20 (101st Cong. Second Session 1990). Rarely mentioned on either side of the legislative history debate is the probability that those few members of Congress who had heard of the Internet when the ADA was passed in 1990 would also likely have known that it was a highly restricted resource, available only to certain government agencies, corporations and universities, but essentially off-limits to the general public.

Fn 76 28 CFR Sec. 36.104.

Fn 77 Note 71, supra.

Fn 78 See, *Cyberspace--Is There a There There, and the ADA*, by Richard W. Millar, Orange County Lawyer, February 2003 (arguing that the Internet cannot be a place because you cannot go there); and see, *Access to Cyberspace: The New Issue in Educational Justice*, by Patricia F. First and Yolanda Y. Hart, 31 J. of L. and Education 385 at 390 (2002) (summarizing arguments against regulation of the Internet). Contrast these with, *ADA Title III and the Internet: Technology and Civil Rights*, by Peter D. Blanck and Lennard A. Sandler, 24 Mental and Phys. Disability L. Rptr. 855 (2000) (refuting free speech arguments against Web accessibility); and see Negative Media Portrayals (NCD ADA Policy Brief No. 5), at Note 9, supra.

Fn 79 Southwest Airlines, Note 58 supra, at n.1.

Fn 80 For a summary of such developments from around the world, see, Chap. 2, Overview and Guidelines, by Cynthia Waddell, in Constructing Accessible Web Sites, Note 84, infra.

Fn 81 Authorities cited in Id.

Fn 82 http://www.w3c.org/wai/

Fn 83 Many Web sites now proudly proclaim their accessibility. Most recently too, as an indication of the perceived market value of accessibility, disability-oriented organizations including the American Council of the Blind (ACB) and the National Federation of the Blind (NFB) have begun certifying Web sites as in conformance with accessibility standards.

Fn 84 Useful online sources of technical assistance and information on the extent and application of accessibility requirements and guidelines, on the means for achieving success, on methods for evaluating accessibility, and on other related matters include: The Worldwide Web Consortium's Web Accessibility Initiative (WAI) (http://www.w3c.org/wai/#resources); The International Center for Disability's Internet Access Primer (http://www.icdri.org/accprim.htm); the ADA Disability Business and Technical Assistance Centers (DBTAC)

(http://www.adata.org/aboutaccessWeb.html); the resources available through the US General Services Administration's (GSA) site (http://www.section506.gov); the Web page accessibility self-evaluation tool called Bobby (http://bobby.watchfire.com/bobby/html/en/index.jsp); and emerging new self-evaluation resources such as the Cynthia Says tool (available through the ICDRI Web site). Also see generally, Constructing Accessible Web Sites, by Jim Thatcher, Paul Boman, Michael Burks, Shawn Lawton Henry, Bob Regan, Sarah Swierenga, Mark Do. Urban and Cynthia Do. Waddell (Glasshaus Publishing 2002); and see Lazzaro.

Fn 85 e.g., 36 CFR Part 1194 (adoption of Section 508 guidelines); see also, Information Technology and People with Disabilities: The Current State of Federal Accessibility (Report Presented by the Attorney-General to the President, April 2000).

Fn 86 See, The Supreme Court's Decisions Regarding Validity and Influence of ADA Regulations, NCD Righting the ADA Policy Brief No. 16, at Note 9 supra.

Fn 87 Compare, Letter from the Equal Employment Opportunity Commission, (responding to an inquiry from a member of the public) (February 4, 2003), 25 NDLR 257 (the letter notes the proactive role played by EEOC in connection with Web accessibility under Title I of the ADA, and also raises the possible interplay between Titles I and III when job applications are made available to the public over the Web).

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